Supreme Court, U.S.
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No. 92-1241

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

OWENS-ILLINOIS, INC.,
Petitioner,

v.

REUBEN S. POOL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

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PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Whether the award of punitive damages against Owens-Illinois made in the absence of the procedural safeguards approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), violated Owens-Illinois' procedural due process rights?

2. Whether multiple awards of punitive damages against Owens-Illinois for a single course of conduct that ended 35 years ago violate Owens-Illinois' procedural and substantive due process rights?

RULE 29.1 STATEMENT

The statement required by Rule 29.1 was included in Petitioner's Petition for Certiorari.

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MISCELLANEOUS

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1. Respondents make the surprising argument that Owens-Illinois, Inc. ("Owens-Illinois") failed to preserve its procedural due process attack on the outrageous punitive damages award below. They took a different position in opposing Owens-Illinois' petition for a writ of error to the Texas Supreme Court. There they *conceded* that the procedural due process issue was properly raised: "Since the amount or propriety of the award has not been challenged, *the only constitutional questions presented* are whether the potential for multiple awards violates due process *or whether or not the Texas common law method of assessing punitive damages is per se unconstitutional and violates due process.*" Appendix to Respondents' Brief in Opposition to Certiorari ("Opp. App.") 54a (emphasis added). Respondents then argued to the Texas Supreme Court at length that Texas law complied with this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct.

1032 (1991), all without any hint they believed this issue had not been preserved. Opp. App. 60a-64a.

The Texas Court of Appeals recognized that Petitioner Owens-Illinois contended that Texas law failed to provide the procedural safeguards approved in *Haslip*, and that court explicitly addresed this contention in its opinion:

> THE CONSTITUTIONALITY OF PUNITIVE DAMAGES
>
> Appellants next contend that the award of punitive damages violates the due process clauses of the United States Constitution . . . .
>
> In [*Haslip*], the United States Supreme Court held that punitive damage awards do not violate the due process provisions of the fourteenth amendment when the award is based on an objective criterion. . . .
>
> In the present case, the trial court's instruction placed reasonable constraints on the exercise of the jury's discretion by defining exemplary damages as an amount awarded to set an example to others and as a penalty . . . . We conclude that the punitive damage award was based on an objective criterion, and thus, the due process provision of the fourteenth amendment was not violated.

Fibreboard Corp. v. Pool, 813 S.W.2d 658, 686 (Tex. Ct. App. 1991), Appendix to Petition ("Pet. App.") 53a-54a. Nothing in the opinion of the Texas Court of Appeals suggests that Owens-Illinois failed to preserve this issue in the trial court or in its appeal. Indeed, Owens-Illinois specifically raised this due process issue as a separate point of error in its appeal to the Texas Court of Appeal. Pet. App. 95a.

The Texas Court of Appeals plainly understood that Owens-Illinois was attacking, on due process grounds, the procedures followed in reaching and reviewing the puni-

tive damages verdict, and that court just as plainly understood that Owens-Illinois had preserved that issue for appeal.

In its petition for a writ of error to the Texas Supreme Court, Owens-Illinois once again specifically included the due process issue. *Id.* 7a. Respondents, as quoted above, explicitly conceded that the *Haslip* issue was properly raised. Although the Texas Supreme Court, after hearing oral argument on the *Haslip* issue, dismissed Owens-Illinois' petition for a writ of error as improvidently granted, *id.* 3a, the transcript of the oral argument reveals no colloquy on whether the *Haslip* issue was properly before that court.

Respondents' new-found contention is that the *Haslip* issue was not adequately preserved because Owens-Illinois did not seek a remittitur and did not argue the award was excessive. Brief in Opposition at 6. Needless to say, Respondents cite no authority for the extraordinary proposition that an unconstitutional verdict must stand unless the defendant argues it is excessive as well as unconstitutional.

Owens-Illinois preserved at each stage its contention that the punitive damages were invalid under the due process principles announced in *Haslip*.

2. The first question presented by this case is, in its essentials, the same as that presented in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992). Owens-Illinois submits that it may be appropriate for this Court to grant certiorari in this case and then remand to the court below for further consideration in light of the *TXO Production* decision when it is handed down.

The crux of this case is that the Texas Court of Appeal relied on a "shock the sense of mankind" standard of review. Pet. App. 56a. While that court *cited* the "detailed substantive standards" for review approved by

this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 1045 (1991), it did not discuss or apply any of those factors in the context of this case. It merely passed over them in silence. *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 686 (Tex. Ct. App. 1991), Pet. App. 55a. Although Respondents assert that "the intermediate Texas appellate court was required to—and did —examine the reasonableness of the punitive damage awards in conformity with the factors set forth in *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981), Brief in Opposition at 17, nothing in that court's opinion supports that assertion.

The first question presented here, just as in *TXO Production*, is whether this procedure in the State courts for assessing millions of dollars of punitive damages squares with due process. The compensatory damages awarded here amount in total to more than $5 million, while the additional $5 million in punitive damages (including $1.2 million against Owens-Illinois) is a pure windfall to Respondents. The amount of punitive damages received no meaningful review in the Texas courts. The *Pool* Respondents struggle to distinguish *TXO Production*, but the two cases plainly raise similar constitutional issues. Owens-Illinois submits that a grant of certiorari is justified here in order to permit a remand for further consideration in light of this Court's eventual decision in *TXO Production*.

3. Multiple awards of punitive damages for the same course of conduct present a mirror image of the theory offered by Professor Tribe on behalf of Respondents in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992). That theory would have punitive damages measured, not by the harm to the plaintiffs sitting in the courtroom, but by the actual or potential harm to *others*. Brief for Respondents in *TXO Production* at 16 ("TXO was a . . . *repeat* offender") (emphasis added); Transcript of Oral Argument at 17-23, 37-38, 44 (Mar. 31, 1993)

(No. 92-479). The question of harm to others has fundamental implications for the constitutional status of multiple awards of punitive damages for the same course of conduct.

Just as the West Virginia court in *TXO Production* supported the punitive damages award there on the ground that TXO's conduct "could potentially cause millions of dollars in damages to other victims," 419 S.E.2d at 889, the Texas court below asserted that "[t]he evidence . . . indicates that [an] unprecedented number of workers will die from asbestos-related cancer." Pet. App. 56a. Respondents argued to the jury here that their punitive damages verdict against Owens-Illinois should reflect the entire harm supposedly caused by Owens-Illinois' conduct: "And these men died by the thousands, and there's going to be a bunch more of them. We're not through yet with the companies ignoring the danger and the risk. *That's why punitive damages.*" *Id.* 112a. "Thousands of men have died from a disease that could have been prevented if . . . these companies would have done what they should have done." *Id.* 113a.

Obviously, both the West Virginia court in *TXO Production* and the Texas court below in this case regard the actual or potential harm to others as a relevant consideration in fixing the amount of punitive damages to be mulcted from a tortfeasor. Yet this plainly implies that a single award of punitive damages for a given course of conduct reflects the *entire sum* necessary to achieve the goals of punishment and deterrence that this Court approved in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991). This is especially true where, as both here and in *TXO Production*, the plaintiff urges the jury to consider the harm to others, and the appellate court takes the harm to others into explicit account.

If a single award, or a number of awards, have been rendered for a given course of conduct, and the amount

of these awards are justified on the basis of harm to others besides the plaintiffs, then due process should require some explicit appellate review of the level of punishment to ensure the amount does not exceed that necessary for the goals of punishment and deterrence. Indeed, Alabama law, as approved in *Haslip*, requires consideration of "the existence of other civil awards . . . for the same conduct, these . . . to be taken in mitigation." 111 S. Ct. at 1045.

One thing is certain: there was no such review by the Texas courts in this case, despite Owens-Illinois' demand for it at each step on the way to this Court.

Although they urged the jury to consider that "all these people [i.e., Owens-Illinois] did was . . . [to] kill thousands of people," Pet. App. 113a,[1] Respondents *now* make the astounding claim that: "These punitive damage awards . . . have been *specifically related to an individual plaintiff*. No recovery was ever made on behalf of all that are harmed, nor could such an award be assessed." Brief in Opposition at 21 (emphasis added). This is moonshine. Respondents told the jury repeatedly to consider the harm to thousands of others in assessing punitive damages, and they introduced expert testimony to support that argument. Pet. App. 109a-111a. Having asked the jury to assess punitive damages for the entire consequences of a single course of conduct, Respondents cannot now claim that the $5 million punitive damages award in this case was strictly limited to the plaintiffs sitting in that one courtroom in Rusk County, Texas.

In support of its post-trial motions, Owens-Illinois submitted a detailed affidavit showing the previous punitive

[1] While it is not at issue in this petition for certiorari, Owens-Illinois notes that it manufactured a single type of product that contained approximately 15% asbestos. It manufactured this product in commercial quantities for approximately a decade, ending in April 1958—35 years ago. Many juries return defense verdicts for Owens-Illinois in asbestos cases. The assertions in Respondents' jury arguments are untrue and outrageous.

damages awards against it and stating that these awards had been based on the same course of conduct that was the subject of the trial in this case. Pet. App. 89a.[2] Although the *Pool* Respondents complain that they had "no way to verify the accuracy" of this affidavit, Brief in Opposition at 9, they never contested the statements in the affidavit in the Texas courts and never sought any discovery to test it. Similarly, the Respondents assert that "there is no evidence in the record now before this Court proving that the transgressions of [Owens-Illinois] in this case are the same that occurred in any other case." *Id.* at 6-7. Yet they ignore the clear, sworn statement of that precise fact in Owens-Illinois' affidavit. Pet. App. 91a ("The punitive damage verdict in this case is based upon substantially the same or similar conduct by Owens that is the basis for the punitive damage verdicts in the cases referred to in Paragraph 7 above."). Respondents never controverted this statement in Owens-Illinois' affidavit.

4. The writ of certiorari should be granted and this case remanded for further consideration in light of this Court's eventual decision in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted,* 113 S. Ct. 594 (1992).

Respectfully submitted,

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[2] Owens-Illinois' affidavit is dated in November 1989. In the years since then, it has been subjected to additional punitive damages awards. At least five of these additional awards are reflected in reported decisions, *see* Petition for Certiorari at 11, and are subject to judicial notice.